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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Office Supreme Court, U.  
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**No. 166**  
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J. HOWARD JOHNSON, as Receiver of All the Rents  
and Profits Issuing Out of Premises Situated on the  
Northeasterly Corner of Green and Beaver Streets, in  
the City of Albany, New York, and WALLACE J.  
ALLENDORF,

*Petitioners,*

*vs.*

JOHN M. SMITH, County Treasurer of the County of  
Albany, et al.

\_\_\_\_\_  
**BRIEF OF RESPONDENT, JOHN M. SMITH,  
COUNTY TREASURER OF THE COUNTY OF  
ALBANY, STATE OF NEW YORK, IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.**

\_\_\_\_\_  
*me* | WALTER L. COLLINS,  
FRANK PEDLOW,  
✓ NEILE F. TOWNER,  
✓ ROBERT E. WHALEN,

*Counsel for Respondent  
John M. Smith.*



# INDEX

## SUBJECT INDEX

### PAGE

Brief of Respondent John M. Smith in opposition to petition:

Statement . . . . . 1

Argument . . . . . 3

Point A—Petitioner's statement does not comply with Rule 12 of the Rules of Supreme Court in that it fails to specify the raising of the alleged Federal question in the Courts below . . . . . 3

Point B—No Federal question having been brought up, the State Court petitioner cannot now set up any denial of Federal right. . . . . 4

Point C—There was no denial of petitioner's rights under the 14th Amendment of the Constitution of the United States nor of the Constitution of the State of New York. . . . . 5

## TABLE OF CASES CITED

*Appleby v. Buffalo*, 221 U. S. 524. . . . . 5

*American Co. v. City of Lakeport*, 230 Col. 548. . . . . 7

*Beardsley v. Ingraham*, 183 N. Y. 411. . . . . 8

*Bonded Municipal Corp. v. Cordon Corp.*, 266 App. Div. 737, aff'd 291 N. Y. 733. . . . . 8

*Chautauqua County Bank v. Risley*, 19 N. Y. 369, 376-377 . . . . . 8

*County of Nassau v. Davy*, 266 App. Div. 738, aff'd 291 N. Y. 733. . . . . 8

*French v. Taylor* (Wash., 1905), 199 U. S. 274. . . . . 9

*Graves v. Schmidlapp*, 315 U. S. 657. . . . . 5

*Ingraham v. Hanson*, 297 U. S. 378. . . . . 7

*Johnson v. Smith*, 297 N. Y. 165. . . . . 2, 8, 9

<i>Lawrence v. State Tax Com'n of Mississippi</i> , 286 U. S. 276.....	5
<i>Levy v. Newman</i> , 130 N. Y. 11.....	8
<i>Matter of Loos</i> , 50 Hun 67.....	8
<i>Messer v. Lang</i> , 176 So. 548, 219 Fla. 546.....	7
<i>Moore v. Potter</i> , 155 N. Y. 481.....	8
<i>People v. Skinner</i> , 115 P. (2nd) 488, 18 Col. (2nd) 349	7
<i>Rinehart v. Hasco Building Co.</i> , 153 App. Div. 153, aff'd 214 N. Y. 635.....	8
<i>Rogers v. Hennepin County</i> (Minn.), 240 U. S. 184.,	6
<i>Spitcanfsky v. Hatten</i> , 182 S. W. (2nd) 86, 353 Mo. 94, 160 A.L.R. 990.....	7
<i>United States v. Rimer</i> , 220 U. S. 547.....	4
<i>Wilson v. Cook</i> , 327 U. S. 474.....	5

## STATUTES CITED

Chapter 86, Laws of 1850, State of New York.....	2
Chapter 62, Laws of 1909, State of New York, known as Chapter 60 of Consolidated Laws of State of New York . . . . .	2
Charter of City of Albany, N. Y.....	2

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**I**

**Statement of the Case**

Because of certain inaccuracies in the Petition and the reasons for allowance of the Writ the respondent, John M. Smith, deems it necessary to make this statement.

At page 4 of Petitioner's Petition, in Subdivision 6, it is stated the property was sold for about fifty-five hundred dollars (\$5,500.00) and assessed for fifty-two thou-

sand dollars (\$52,000.00) later reduced to forty thousand dollars (\$40,000.00) and at page 6, subdivision 9, of the Petition, paragraph C, under reasons for allowance of Writ, the Petitioner states,

"The result of said decision is to permit a piece of property worth at least \$40,000.00 to be acquired for about \$5,500.00 by a Court which has seized the property and deprived the parties interested in the property from collecting its rents and profits, and rendered them helpless and refusing to protect infants interested, the wards of the Court."

The facts are as follows:

The amount for which this property was sold in the respective years of 1939 and 1940 to the County of Albany, was only the amount of the tax liens against the property, with interest and expenses of sale, which petitioners had neglected and failed to pay within the time provided by law. The conveyance of the County's interest to the Federal Investors, Inc., likewise was only for the amount of the tax liens against said property.

The power and authority of the respondent, John M. Smith, as County Treasurer, to sell for tax liens is Chapter 86 of the Laws of 1850, of the Laws of the State of New York and of the Acts amendatory and supplemental thereto; the Tax Law of the State of New York, Chapter 62 of the Laws of 1909 of the State of New York, and Acts amendatory and supplemental thereto, known as Chapter 60 of the Consolidated Laws of the State of New York, and the Charter of the City of Albany.

The procedure for sale for unpaid taxes and what was done herein are clearly set forth in the Court of Appeals decision in *Johnson v. Smith* (297 N. Y. 165).

When the taxes assessed against this property became due and payable, they were not paid within the time pre-

scribed by law, and upon default were returned to the County Treasurer of the County of Albany, who, thereupon, proceeded to advertise and sell the said premises for taxes and interest, including the water rents and expense of the sale, and thereafter sold the premises pursuant to law.

These facts are admitted by the petitioner herein (see Complaint in action, paragraphs 7 to 23 inclusive, folios 87 to 101).

### **Argument**

#### **SUMMARY OF ARGUMENT**

Point A.—This being an appeal from a State Court, the statement of Petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify the raising of the alleged Federal question in the Courts below.

Point B.—No Federal question having been brought up in the State Courts, Petitioner cannot now set up any denial of an alleged Federal right.

Point C.—There was no denial of Petitioner's rights under the 14th Amendment of the Constitution of the United States nor of the Constitution of the State of New York.

#### **POINT A**

**Petitioner's statement does not comply with Rule 12 of the Rules of the Supreme Court in that it fails to specify the raising of the alleged Federal question in the Courts below.**

Nowhere in petitioner's statement is it specified at what stage of the proceedings in the Court of the first instance and in the Appellate Court, at which and the manner in

which the Federal question (14th Amendment) sought to be reviewed was raised; the method of raising it and the way in which it was passed upon by the State Court.

As a matter of fact the 14th Amendment was never mentioned until Petitioner made the application for a writ of certiorari.

This is sufficient to deny the petition.

*United States v. Rimer*, 220 U. S. 547.

#### POINT B

**No Federal question having been brought up in the State Court, petitioner cannot now set up any denial of an alleged Federal right.**

Throughout the State Courts petitioner contended that the County Treasurer was without authority to conduct tax sales on this property for the delinquent taxes because there was a receiver of rents appointed by the State Court in a partition action then pending. Petitioner argued that the property was in custody of the State Court and the County Treasurer as an agent of the executive branch of government could not perform the duty commanded of him by the Legislature to sell this property because of default in payment of taxes.

The petitioner argued about the separation of powers between the judicial, executive and legislative branches in the State.

Nowhere in any of the State Courts did the petitioner raise the question that his rights or those of any of the parties to the partition action under the 14th Amendment of the United States Constitution were denied, violated, infringed or jeopardized.

Having failed to interpose any denial of any alleged Federal right in the State Courts, petitioner is precluded



from asserting the alleged denial of a Federal right for the first time on this application.

*Appleby v. Buffalo*, 221 U. S. 524, 55 L. Ed. 838, 31 Sup. Ct. 699.

*Wilson v. Cook* (Ark.), 327 U. S. 474.

#### POINT C

**There was no denial of petitioner's rights under the 14th Amendment of the Constitution of the United States nor of the Constitution of the State of New York.**

"The power to tax is in incident of sovereignty, and is coextensive with that to which it is an incident, and all subjects over which the sovereign power of the State extends are objects of taxation."

*Graves v. Schmidlapp*, 315 U. S. 657.

"States have unrestricted power to tax those domiciled within them, so long as the tax is imposed upon property within the State or on privileges enjoyed there and it is not palpably arbitrary or unreasonable."

*Lawrence v. State Tax Commission of the State of Mississippi* (1932), 286 U. S. 276.

In this case no question is raised concerning the right of the municipality to tax, nor of the assessment nor the amount of the taxes. Petitioner's claim that the respondent, as County Treasurer, though commanded by statute, was powerless to sell this property for delinquent taxes because there was a receiver of rents appointed by the State Court in a partition action and the property therefore was in the custody of the Court (State) and a sale thereof during the alleged custody was void.

The property herein was assessed in the name of "Sarah A. Kimball." In 1925 her heirs, as tenants in common,

instituted a partition action. This action is still pending and undetermined after over twenty-three years of litigations. Successive receivers of rent were appointed, the petitioner being the last receiver. Taxes on this property were paid from time to time during the litigation. There was default in payment of the taxes for the years 1938 and 1939, and pursuant to statute the respondent sold the property in 1940 and 1941 to itself for the amount of the tax liens which it was enabled to do under law. The county thereafter conveyed its interests in the property to the Federal Investors, Inc., for the amount of the unpaid tax liens.

Five years after the last tax sale, in 1946, the petitioner receiver and one of the parties to the partition action instituted this action to set aside the tax sales, and the conveyances subsequently made as "null, void and of no effect."

It is acknowledged that the County Treasurer complied faithfully and completely with all applicable provisions of law, of City Charter and tax statutes, but it is contended that the property was in the custody of the Court through its receiver and that its sale, without Court permission, was void.

On this application petitioners claim that Respondent Smith's action, in accordance with the statutes governing sale of property for delinquent taxes, denied to them and those interested equal protection of the laws and deprived them of property without due process of law.

The question whether certain property is taxable under the State Law is a State question and does not touch fundamentals contemplated by the 14th Amendment.

*Rogers v. Hennepin County* (Minn.), 240 U. S. 184.

In this case petitioner and those interested in the property had the remedy of paying their taxes within the time

prescribed by law. Under the appropriate statutes (referred to hereinbefore) they were afforded the right to redeem even after the sale by the County Treasurer. Thus, in addition to being given the entire year for payment of taxes to the municipality they were afforded almost nine months before the County Treasurer sold and one year after he sold, in which to redeem. Under the law they were afforded the same protection as every other citizen within the tax district.

The sovereign may adopt any appropriate procedure known to the law to collect taxes and it is not required to provide for hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such a tribunal in order not to violate requirements of "due process of law."

*People v. Skinner* (1941), 115 P. (2nd) 488, 18 Col. (2nd) 349.

Statutes providing for tax sales, allowing counties to purchase lands at tax sales and for the sale of tax sale certificates do not deny due process of law.

*Ingraham v. Hanson*, 297 U. S. 378.

*American Co. v. City of Lakeport*, 230 Col. 548.

*Messer v. Lang*, 176 So. 548, 219 Fla. 546.

*Spitcanfsky v. Hatten*, 182 S. W. (2nd) 86, 353 Mo. 94, 160 A.L.R. 990.

The petitioners' claim that because there was a receiver appointed by the State Court in the partition action the County Treasurer must obtain permission of the Court before selling for non-payment of taxes is to assume the existence of a power in the Court to prevent the tax sale or postpone it indefinitely.

Such a practice would create tax exemption by judicial fiat in favor of receiver-held property in contravention of

the Constitutional provision that, "Exemptions from taxation may be granted only by general laws."

Under the statutes of the State of New York, once a default occurs and the statutory conditions are met the County Treasurer must obey the law and sell the property no matter by whom owned, whether incompetent, infant, trustee, or receiver.

*Johnson v. Smith*, 297 N. Y. 165.

*Levy v. Newman*, 130 N. Y. 11.

*County of Nassau v. Davy*, 266 App. Div. 738, aff'd 291 N. Y. 732.

*Bonded Municipal Corp v. Cordon Corp.*, 266 App. Div. 737, aff'd 291 N. Y. 733.

Receivers in partition actions obtain no title to property.

*Rinehart v. Hasco Building Co.*, 153 App. Div. 153, aff'd 214 N. Y. 635.

There is no relation between a receiver or trustee appointed by a Court pursuant to a statute, such as the Federal Bankruptcy Act and the receiver in partition. The Court, in appointing a receiver in a partition action simply does so to preserve the rights of the parties thereto as against each other.

*Johnson v. Smith*, 297 N. Y. 165.

Failure to obtain leave from the Court neither defeats the action brought nor invalidates the sale effected.

*Chautauqua County Bank v. Risley*, 19 N. Y. 369, 376-377.

*Moore v. Potter*, 155 N. Y. 481, 491.

*Beardsley v. Ingraham*, 183 N. Y. 411, 420.

*Matter of Loos*, 50 Hun 67, 70, 71.

Petitioner's claim in effect is, that using the receivership as a shield, the County may be prevented from sell-

ing this property for delinquent taxes while the parties carry on a protracted litigation (now over twenty-three years) to determine their individual interests. This question has been determined in favor of the taxing authorities by the Court of Appeals of the State of New York in *Johnson v. Smith* (297 N. Y. 165). Therein it is said:

"In the present case, the taxes were not paid, and the County Treasurer, in selling the property under compulsion of the Tax Law, complied strictly with every applicable provision. The sales, as well as the tax deed and the subsequent conveyances being valid and proper, are immune from attack. The owners of the property and the receiver were granted a privilege by statute to redeem; they chose not to avail themselves of it."

None of the cases cited by the petitioners are germane to the question herein.

Petitioners and owners show no denial of rights under the 14th Amendment. Their remedy was to pay the taxes. They were given the same privilege as every other taxpayer within the district and did not exercise their right of redemption.

A decision of a State Court that the formalities required by the Tax Laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

*French v. Taylor* (Wash., 1905), 199 U. S. 274.

In view of the fact that respondent acted under the command of the statutes of the State of New York; that there was no denial of rights of petitioners and owners within the meaning of the 14th Amendment of the United States Constitution or the Constitution of the State of

New York; that there is no Federal question herein and that the petitioner and owners neglected to pay their taxes on this property and failed to redeem the sales within the time allowed by law, their petition for a writ of certiorari should be denied.

**It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.**

Dated: August 18, 1948.

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